Vinson & Elkins
ATTORNEYS AT LAW

VINSON & ELKINS L.L.P.
2300 FIRST CITY TOWER
1001 FANNIN STREET
HOUSTON, TEXAS 77002-6760
TELEPHONE (713) 758-2222
FAX (713) 758-2346

WRITER'S TELEPHONE
(713) 758-2528

WRITER'S FAX
(713) 615-5311

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BY FAX AND FEDERAL EXPRESS

Delmar Karlen, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 2
290 Broadway, 17th Floor
New York, New York 10278

Re: Passaic River Six-Mile Study Area

Dear Mr. Karlen:

Representatives of Maxus Energy Corporation ("Maxus"), responding on behalf of Occidental Chemical Corporation, had a productive meeting with EPA representatives concerning the EPA comments on the draft Ecological Sampling Plan ("ESP") on May 9, 1996. Several legal issues arose in our discussions and I wanted both to confirm our position in writing and to bring these issues to your attention.

In the comments to Maxus' draft ESP, the Agency initially took the position that there is to be no sampling in connection with the combined sewer outfalls ("CSOs"). The Agency also directed that all biota and other sampling be located in areas away from influence of the CSOs and their respective scour areas. In our discussions with Agency personnel, they agreed that the CSOs are a current ongoing source of hazardous substances to the Study Area at potentially significant levels. However, they explained, because the CSOs are currently permitted under the National Pollutant Discharge Elimination System, they are "federally permitted releases" within the meaning of Section 101(20) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, ("CERCLA"). For this reason, Agency personnel asserted that sampling that may be influenced by the CSOs should not be

addressed within the Remedial Investigation/Feasibility Study ("RI/FS") for the Study Area.

We believe that CERCLA, the National Contingency Plan ("NCP") and the Administrative Order on Consent ("AOC") require that the CSOs' contribution to sediment quality be evaluated and considered in the process of screening remedial alternatives and selecting a remedy for the Study Area, if any is required. We also believe that it is technically impossible to eliminate the effects of the CSOs from any measurement of sediment quality in the Passaic River.

Briefly, the plain language of CERCLA requires that the Agency evaluate and respond to all releases that threaten human health and the environment. CERCLA defines "releases" to include permitted releases. *See* CERCLA § 101(22)(Release is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging . . ."). This definition creates a very broad class of discharges that trigger obligations and liabilities under the statute. *Amoco Oil v. Borden,* 889 F.2d 664 (5th Cir. 1989)(noting breadth of definition). All CERCLA provisions that define the Agency's duty to respond to environmental conditions are triggered by and based on this broad term "releases."[1]

"Federally permitted releases," a defined term in CERCLA, is a subset of the larger class of "releases." According to the statute, federally permitted releases are "discharges" made in compliance with a specific list of permitting structures, including the Clean Water Act and its pretreatment program. *See* CERCLA § 101(10). Congress did exclude some discharges from the definition of release,[2] but it did not exclude "federally permitted releases" from the definition of release.

CERCLA refers to federally permitted releases only in addressing liability issues. *See* CERCLA § 107(j) ("Recovery by any person (including the United States . . .) for

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[1] *See* CERCLA§ 104 (invoked in AOC) ("Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment or (B) there is a release or substantial threat of a release into the environment of any pollutant or contaminant . . . the President is authorized to act . . . "); CERCLA § 106 (invoked in AOC)(". . .when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual release of a hazardous substance . . . he may . . . take other action under this section . . . "); CERCLA § 122 (invoked in AOC)("The President in his discretion may enter into an agreement with any person (including the owner or operator of a facility from which a release . . . emanates . . .) to perform any response action.").

[2] *See* CERCLA § 101(22) (excluding workplace and certain nuclear releases from definition of release).

response costs or damages resulting from a federally permitted release shall be pursuant to existing law rather than this section."[3] The meager legislative history of the provision suggests only that Congress did not wish to tamper with already then existing enforcement schemes when CERCLA was adopted. *See* S.REP. NO. 96-830, 96th Cong. 2nd Sess. (1980).

The courts have consistently interpreted these provisions only as defenses to liability. *See Reading Co. v. City of Philadelphia*, 823 F.Supp. 1218 (E.D. Pa. 1993) (whether discharge of PCBs was permitted). At other sites, the Agency has successfully pursued claims for costs relating to permitted releases for any releases that were not expressly permitted, exceeded limitations of permit or occurred when there was no permit. *U.S. v. Iron Mountain Mines,* 812 F.Supp. 1528 (E.D. Cal. 1992); *In re Acushnet River & New Bedford Harbor*, 722 F.Supp. 893 (D. Mass. 1989). To date the Agency has adopted an approach concerning the CSOs in the Passaic River consistent with this case law. The Agency has therefore issued notice letters to PRPs that discharged to the River through the CSOs before the CSOs were permitted.[4]

The NCP outlines the process for evaluating site conditions without regard to enforcement issues. Accordingly, the NCP requires evaluation of all site conditions and all site risks so that remedies can be effectively screened for efficiency and effectiveness. *See* 40 C.F.R. § 300.5 (" . . . RI is a process undertaken by the lead agency to determine the nature and extent of the problem presented by the *release.*") (emphasis added); 55 F.R. 8666, 8708 (Mar. 8, 1990) (Preamble to the NCP) ("The purpose of the RI as stated in the proposed NCP is to collect data necessary to adequately characterize the site for purpose of remedy selection. . ."). "Federally permitted releases" is not even defined in the NCP.

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[3] *See also* CERCLA § 103(b)(3) (no reportable quantity release obligation for federally permitted releases).

[4] *See* Letter dated October 27, 1995 from EPA to Robert Polack, Esq., Vice President and General Counsel, Reilly Industries, Inc. explaining the notice letter to Reilly ("beginning in 1950 and continuing to the present time, during periods of peak flows, when the volume of material exceeded the capacity of the sewer trunk line, the sewer would be systematically bypassed to the Passaic River . . . "); Letter dated November 15, 1995 from EPA to Donald J. McConnell, Esq., Environmental Counsel, the Sherwin Williams Company (including Lubetkin Affidavit on bypassing practice as evidence of Reilly's liability) ; Letter dated March 13, 1996 to Peter Simshauser, Counsel to Chris-Craft Industries Inc. (referring to bypassing practice as evidence of Montrose's liability).

The NCP authorizes agency response to any release of a hazardous substance. 40 C.F.R. § 300.400(a)(1&2). Some releases are specifically excluded from the Agency's authority, 40 C.F.R. § 300.400(b)("Limitations on Response"), but these are exclusions only for certain naturally occurring substances, products in residential structures and releases from deterioration of public or private water supplies. Federally permitted releases are not excluded by either CERCLA or the NCP.

Remedial Investigations, according to the NCP, are intended to address "site conditions," 40 C.F.R. § 300.430(a)(2), a term that includes all aspects of the condition of the site. The Agency is to consider many potential causes of conditions that are immune from enforcement actions: for example, in scoping the RI the Agency should evaluate the effects of previous removals under Superfund and site inspections. *See* 40 C.F.R. §300.430(b)(1). In the RI itself the Agency is directed to consider physical characteristics of the site and the characteristics or classifications of surface or groundwater. 40 C.F.R. § 300.430(d)(2)(i & ii).

The AOC also requires that the CSO data be included in evaluation of the Study Area. The AOC requires that the RI be implemented in accordance with the Statement of Work ("SOW"), CERCLA and the NCP. AOC ¶ 35. We have already explained how deliberately excluding CSO data violates the statute and the NCP. The SOW establishes as one of the "Goals of Work to be Performed" that Occidental "[d]etermine the horizontal and vertical distribution and concentration of PCDDs, PCDFs, PCBs, PAHs, pesticides and metals." SOW (AOC Appendix I) at p. 3. This language does not distinguish between sources of contaminants--it requires a complete characterization of the sources of all listed substances. All of the provisions in the SOW concerning the collection of sediment samples address quantifying contaminants of concern without regard to their source. SOW at p. 4 ¶ 3(i)(1-6).

EPA guidance requires that contaminants in the Study Area be characterized without regard to their origin. The SOW requires that the RI be implemented in accordance with EPA's *Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA* (OSWER Dir. 9355.3-01)(1988)("RI Guidance"). SOW at 2. As does CERCLA and the NCP, the RI Guidance requires characterization of actual site conditions without regard to the permit status of the source. *See* RI Guidance at 2-7 (Conceptual site model to include known and suspected sources of contamination); *id.* at 3-6 (Surface water hydrology investigation makes no mention of permit); *id.* at 3-13 ("The final objective of the field investigations is to characterize the nature and extent

of contamination" such that informed decisions can be made as to the level of risk presented by the site and the appropriate types of remedial response.") There is no discussion of federally permitted releases in the RI Guidance.[5]

The RI Guidance requires that sediment sampling locations, like groundwater sampling locations ". . . should be chosen at the perceived location(s) of contaminant entry to the surface water and downstream as far as necessary to document the extent of contamination." *Id.* at 3-17. Thus, failure to sample adjacent to CSOs would be directly contrary to this RI Guidance.

CERCLA, the NCP, the AOC and the RI Guidance require an accurate characterization of all releases of hazardous substances for at least two reasons: First, the Agency must have an accurate characterization so that the Agency can accurately estimate total risk posed by the site. The NCP explains that the RI must assess "the extent to which the release poses a threat to human health or the environment" by collecting information about the sources and nature of hazardous substances. 40 C.F.R. § 300.430(d)(2). The NCP specifically directs the Agency to use this information to "conduct a site specific baseline risk assessment to characterize the potential threats to human health and the environment . . . " 40 C.F.R. § 300.430(d)(4). The RI Guidance states the relationship explicitly: "The final objective of the field investigations is to characterize the nature and extent of contamination such that informed decisions can be made as to the level of risk presented by the site and the appropriate types of remedial response." RI Guidance at 3-13. The Agency understands, as its personnel have stated, that including the CSO data would have the effect of raising the risk levels presented by the Study Area. A risk assessment that does not include this data will not accurately assess the risk at the site.[6]

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[5] The RI Guidance also requires that the RI investigate surface features that contribute to site conditions: "Investigation of surface features should not be limited to those that are on site, but should include significant off site features as well. *Other facilities in the area that are potential contributors to contamination should also be identified.*" RI Guidance at 3-5.(emphasis added) The RI Guidance also suggests that scoping an RI/FS begin with evaluation of all existing data sources; it then specifically lists sewage treatment plants among sources of information. These sewage treatment plants are also there identified as sources of hazardous waste with both subsurface and surface migration pathways. *Id.* at 2-5, referencing Table 2-1.

[6] The draft ESP proposes sampling actual CSO effluent as well as locating biota sampling in habitats that may have been influenced by CSOs. Previously sampling has focused on sediment adjacent to CSOs. The effluent testing will characterize most accurately the nature of the contribution by the CSOs to the Study Area. The effluent testing will also quantify the suspended materials in the CSOs' contributions to the Study Area. These suspended materials are more bioavailable to fish than is sediment.

Finally, the EPA must accurately characterize the contribution of the CSOs in order to screen remedial alternatives for effectiveness. As the NCP, SOW and RI Guidance explain, the purpose of the Feasibility Study is to screen remedial alternatives for effectiveness. 40 C.F.R. § 300.430(e)(9)(C) ("Alternatives shall be assessed for the long term effectiveness they afford . . . "); SOW at p. 15; RI Guidance at 6-3, 6-8 to 6-9. EPA recognizes the importance of CSOs as a source of contaminants of concern in the waterway.[7] CSOs as ongoing sources of hazardous substances will materially influence the effectiveness of any remedy. Without data on contribution of CSOs to sediment, EPA will not be able to evaluate properly the effectiveness of any remedy.

We understand that the CSOs present legal, political and practical problems for the Agency. We have followed the development of the Agency's Combined Sewer Overflow Policy with great interest, and we recognize the difficulty confronted by the municipal and state entities responsible for maintaining and improving these facilities. However, the Agency has a clear statutory obligation to develop an accurate scientific record of actual site conditions. An attempt to exclude CSO influenced sediment or biota from the data collection for and evaluation in the RI/FS fails to fulfill that duty. Worse yet, a risk assessment that does not include this data will be inaccurate and unreliable and a feasibility study that ignores the CSOs will never evaluate which remedies, if any, would be effective in the Passaic River Study Area. Unless the CSO data is included, the Agency's administrative record for its decision on a remedy, the risk assessment and the FS, will be inaccurate and impeachable as well as not in accordance with law.

For these reasons, we urge the Agency not to eliminate any sampling proposed by Maxus on the basis that the results could be influenced by CSOs in the Passaic River Study Area.

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[7] *See* 60 F.R. 62546, 62550 (Dec. 5, 1995) ("CSOs often contain high levels of suspended solids, bacteria, pathogens and in many instances, heavy metals and other toxic pollutants . . . "); 60 F.R. 21189, 21190 (May 1, 1995) (EPA reported to Congress that "pollution from wet water discharges is cited by States as the leading cause of water quality impairment"); 59 F.R. 18688 (April 19, 1994) (Combined Sewer Overflow (CSO) Control Policy).

Pursuant to CERCLA Section 113(k), 42 U.S.C. § 9613(k), Maxus designates this letter for inclusion in the administrative record for the Passaic River Study Area.

Very truly yours,

Carol E. Dinkins

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cc: Ms. Amelia Wagner
Mr. Lance Richman